

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Review of Regulatory Requirements)	
Incumbent LEC Broadband)	CC Docket No. 01-337
Telecommunications Services)	
)	
)	

**REPLY COMMENTS OF
NUVOX, KMC, and CBEYOND**

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SUMMARY

The Commission's premise is that broadband deployment is too slow, and that deregulation will increase the pace of deployment. The record indicates, however, that this premise is flawed on two levels. First, the Commission already has found that the pace of broadband deployment is adequate. Moreover, the record shows that, to the extent this pace could be increased, the issue is lack of consumer demand, not broadband supply. Second, as the comments amply show, deregulation will not result in an increase in broadband deployment. Rather, because insufficient competition exists, deregulation will serve only to stifle further competition, making the ILECs even less likely to deploy broadband facilities.

The ILECs urge the Commission to ignore their dominance in wireline broadband markets. The Telecommunications Act of 1996 ("the Act"), which delegates to the Commission the role of issuing regulations to establish *wireline* competition, does not permit such an approach. Moreover, the comments also show that the role of intermodal broadband competition has been wildly overstated. Even one of the ILECs' own experts states that intermodal competition is nearly nonexistent in the markets served by the Joint Commenters.

As demonstrated in our initial comments, competition is the engine of broadband deployment because it forces the ILECs to deploy their own broadband facilities to meet the competition provided by wireline competitors. Dominant carrier regulation, along with the vigorous enforcement of the Act's local competition provisions, is what makes competition possible. The ILECs' comments make no credible

showing that this regulation imposes significant costs. Removing dominant carrier regulation to spur broadband deployment makes about as much sense as cutting off an airplane's engines to save weight so that the plane can fly higher. Gutting dominant carrier regulation at this crucial time will result in the crash and burn of broadband competition, will not spur broadband deployment, and represents a departure from the will of Congress as expressed in the Act.

The record demonstrates that the ILECs' remain dominant in the provision of both wholesale and retail broadband services. The public interest demands that the Commission fulfill its obligations by continuing to impose dominant carrier regulation on the ILECs, and by continuing to enforce stringently its current rules concerning interconnection and unbundling obligations.

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NuVox Communications, Cbeyond Communications, and KMC Telecom, Inc.¹ (collectively, “the Joint Commenters”), through their attorneys, hereby file these reply comments in response to the Commission’s *NPRM*² urging the Commission to reiterate that ILECs remain dominant in the provision of broadband services because they retain the dominant share of the market for *wireline* broadband services, and because they possess, and in fact have exercised, market power to the detriment of competitive broadband providers and consumers. The Joint Commenters urge the Commission to enforce stringently its current rules and to continue to impose dominant carrier regulation on ILECs in their provision of broadband services.

I. INTRODUCTION

The Commission’s premise is that broadband deployment is too slow, and that deregulation will increase the pace of deployment. The record indicates, however, that this

¹ KMC Telecom, Inc. (“KMC”), which did not formerly participate in the initial round of comments, fully supports the initial comments filed by NuVox and Cbeyond in this proceeding. KMC is a facilities-based integrated communications provider offering voice and broadband data services over nearly 3 million lines to more than 14,000 small/medium/large business and public/private institutional end users in 35 tier-three markets in 17 states east of the Rocky Mountains.

² *In the Matter of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337 (rel. Dec. 20,2001) (NPRM or Notice).

premise is flawed on two levels. First, the Commission already has found that the pace of broadband deployment is adequate. Moreover, the record shows that, to the extent this pace could be increased, the issue is lack of consumer demand, not broadband supply. Second, as the comments amply show, deregulation will not result in an increase in broadband deployment. Rather, because insufficient competition exists, deregulation will serve only to stifle further competition, making the ILECs even less likely to deploy broadband facilities.

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As demonstrated in our initial comments, competition is the engine of broadband deployment because it forces the ILECs to deploy their own broadband facilities to meet the competition provided by wireline competitors. Dominant carrier regulation, along with the vigorous enforcement of the Act’s local competition provisions, is what makes competition possible. The ILECs’ comments make no credible showing that this regulation imposes significant costs. Removing dominant carrier regulation to spur broadband deployment makes about as much sense as cutting off an airplane’s engines to save weight so that the plane can fly higher. Gutting dominant carrier regulation at this crucial time will result in the crash and burn of broadband competition, will not spur broadband deployment, and represents a departure from the will of Congress as expressed in the Act.

The record demonstrates that the ILECs’ remain dominant in the provision of both wholesale and retail broadband services. The public interest demands that the Commission

fulfill its obligations by continuing to impose dominant carrier regulation on the ILECs, and by continuing to enforce stringently its current rules concerning interconnection and unbundling obligations.

II. THE RECORD SHOWS THERE IS NO DECLINE IN THE ROLLOUT OF BROADBAND, AND THAN ANY LESSENING OF ROLLOUT IS DUE TO A DECREASE IN DEMAND, NOT SUPPLY

Many commenters observed that the “problem” the Commission seeks to solve through deregulation – the alleged slow pace of broadband deployment – simply does not exist.³ In fact, as commenters pointed out, the speed at which consumers have adopted broadband rivals that of some of the most popular consumer products of all time.⁴ To the extent broadband deployment could be even faster, numerous commenters showed that the slowing, if any, in the rate of adoption of broadband by consumers results from a lack of *demand*, not a lack of supply. After the comment deadline, the Chairman of President Bush’s Council of Advisors on Science and Technology reached the same conclusion. Moreover, the comments show this low demand is a result of the ILECs’ own actions in raising prices, and thereby, dampening demand, and their actions to forestall price competition by erecting entry barriers. This Commission must not take the drastic step of eliminating prematurely dominant carrier regulation of ILECs to solve a problem that does not even exist.

A. According to the Chairman of President Bush’s Council of Advisors on Science and Technology, the Supply of Broadband Outpaces Consumer Demand

The Commission has proposed drastic measures, such as unwarranted deregulation of the ILECs, to spur consumer adoption of broadband. Yet, a few days after the comment deadline in this proceeding, John Marburger, the chairman of the President’s Council

³ See e.g. AT&T comments at 70; Information Technology Association of America (ITAA) comments at 1.

⁴ AT&T comments at 70.

of Advisors on Science and Technology (PCAST) told reporters that the supply of broadband exceeded demand. According to PCAST chairman Marburger, “it turns out that the access to existing broadband . . . is not being exploited by consumers.”⁵ Marburger said that PCAST would not address broadband deregulation, but rather would focus on issues relating to broadband demand, such as what sorts of applications need to be developed to spur consumer demand, as well as potential obstacles to demand, such as security concerns, pricing issues, and the extent to which copyright restrictions are preventing consumers from having access to rich broadband content.⁶ The Commission claims it wants a deregulatory approach to broadband deployment that relies on markets. Yet, the Notice’s premise that broadband demand must be jumpstarted -- whether consumers want it or not -- belies this view, and would represent regulatory meddling of the worst sort.

B. The Record Demonstrates that Any lack of broadband rollout by ILECs has been solely self-inflicted, as the ILECs have dampened DSL demand by raising prices, and reneging on commitments made to regulators to deploy broadband

As several commenters recognized, the most important factor in adoption of broadband by consumers is price.⁷ Many commenters noted that several of the RBOCs recently raised prices of their DSL services once their competitors exited the marketplace.⁸ That these companies could raise prices proves two things: first, that they possess market power for broadband, and second, that there exists insufficient intermodal competition to provide a check on ILEC broadband prices.

⁵ David McGuire, washingtonpost.com Newsbytes, “Bush Tech Advisors Will Tackle Broadband Demand,” www.newsbytes.com/news/02/17498.html, visited March 5, 2002.

⁶ *Id.*

⁷ See DirecTV Broadband comments at 15; Comments of Cbeyond and NuVox at 25.

⁸ AT&T comments at 2-3; Comments of Cbeyond and NuVox at 21-23; Earthlink comments at 24.

As the comments show, any lack of broadband rollout by ILECs has been solely self-inflicted.⁹ The ILECs' price increases resulted in a predictable decrease in demand. Indeed, as AT&T recognized in its comments, the ILECs have a perverse incentive *not* to deploy broadband, and to keep prices high because of the huge profits they reap by selling second phone lines which a broadband line would replace.¹⁰

As many commenters also noted, the ILECs also have willfully slowed the rollout of broadband by renegeing on commitments they made to regulators to deploy broadband. BellSouth's comments are a case in point. BellSouth claims that its broadband deployment plans depend on whether the Commission gives in to its demands to loosen regulations that allow wireline competitors to compete with it.¹¹ It claims that SBC made a similar decision not to deploy broadband in Illinois after regulators there rebuffed SBC's demands for regulatory concessions.¹² Yet, if competition truly existed as these carriers claim, to deploy or not to deploy broadband would not be the ILECs' unilateral decision to make. If competition existed, the ILECs would be forced to meet it and deploy their own facilities, as they did before they drove the data CLECs out of business. That SBC and BellSouth can attempt to extort concessions from regulators by threatening to refuse to deploy broadband merely proves that they possess market power and that competition, whether intra or intermodal, is insufficient to provide any check on their actions. The ILECs' actions could not be contemplated *unless* they possessed market power, and proves they remain dominant in the provision of broadband.

The ILECs argue that the alleged slow pace of broadband deployment is the result of regulation, when in fact any slowing in the growth rate is due to the ILECs' own actions of

⁹ See *id.*

¹⁰ AT&T comments at 44.

¹¹ BellSouth comments at 23-24.

¹² BellSouth comments at 6-8.

raising prices and reducing output in order to extort concessions from regulators. This argument is akin to seeking sympathy for being an orphan after killing one's own parents. The Commission must resist the ILECs' hypocritical pleas, and instead must stringently enforce current regulations that make competition possible.

III. CONTRADICTING THEIR LAWYERS, EVEN ONE OF THE ILECS' OWN EXPERTS AGREE THAT THE GEOGRAPHIC DEFINITION OF THE MARKET MUST BE LOCAL, NOT NATIONAL

In a ploy to further entrench their near-monopoly over wireline broadband services, Verizon and SBC claim the relevant geographic market should be the entire nation and not local areas. As many commenters noted, the ILECs' position defies common sense.¹³ The fact that a choice of competitive providers exists in one part of the country does not help a consumer unless he lives in that part of the country. One of the ILECs' own economic experts contradict their lawyers statements on this point, and agrees with the analysis put forth by competitive interests. In a paper published in May of 2001, SBC's economic expert in this proceeding, Gregory Sidak, states categorically that "broadband Internet services markets are local in nature."¹⁴ The Joint Commenters point to Sidak's statements not because Sidak's views should be given any credence, but rather, to highlight the ILECs' embarrassing failure to "get their story straight" prior to filing their comments.

As noted by numerous commenters, and as admitted by one of the ILECs' own experts, the ILECs' attempts to define the relevant geographic market as national must fail. If a competitive alternative provider does not exist locally, the end-user simply has no access to that choice, and remains at the mercy of the ILEC's market power for broadband service.

¹³ Earthlink comments at 23; Wisconsin PSC comments at 4.

¹⁴ "Cable Modems and DSL: Broadband Internet Access for Residential Customers," Jerry A. Hausman, J. Gregory Sidak, Hal J. Singer, American Economics Association, Internconnection and Access in Telecom and the Internet, Vol. 91, No. 2, May 2001 at 305. In contrast, SBC's lawyers argue that the relevant geographic market should be "the nation as a whole." SBC comments at 32.

Accordingly, any relevant analysis of broadband competition must define the geographic market as local and not national.

IV. SBC’S EXPERT ALSO CONTRADICTS ITS LAWYERS ON THE ISSUE OF INTRAMODAL COMPETITION, ADMITTING THAT INTERMODAL COMPETITION FROM CABLE IS NO FACTOR IN THE BUSINESS MARKET

In their Comments, the Joint Commenters and others noted that intermodal competition from satellite, cable, and terrestrial wireless providers is nearly nonexistent in the small to medium sized business markets where they provide service.¹⁵ A survey performed by the Ad Hoc Committee of Telecommunications Users confirms this reality. According to Ad Hoc, virtually *no* competitive choices exist beyond the ILECs for broadband business users, and indeed, the only competitive providers likely to exist are *wireline* providers such as the Joint Commenters.¹⁶ In response to these facts, the ILECs try to gloss over the fact that a separate market even exists for small and medium sized businesses. The ILECs offer nothing more than bare assertions that intermodal competition exists in the overall business market, let alone in the small-to-medium sized business market segment.

The ILECs’ bare assertions about the existence of competition are contradicted by the facts. Comments submitted by the Joint Commenters, Ad Hoc Telecommunications Users, and others show the small and medium sized business market to be nearly devoid of meaningful competition for broadband. In addition, SBC’s expert Sidak once again contradicts its lawyers on this point, stating categorically that “cable has little presence in the business sector.”¹⁷ There simply is no evidence whatsoever on which the Commission could validly conclude that intermodal competition exists to challenge ILEC dominance in the small-to-medium-sized business markets.

¹⁵ Comments of Cbeyond and NuVox at 27-28; See also Ad Hoc comments at 17; AT&T comments at 40-41.

¹⁶ Ad Hoc comments at 17.

The Commission is required by law to consider the impact of its actions on small and medium sized businesses.¹⁸ Any approach, such as the market definitions put forth by the ILECs, that fails to take into account the needs of small and medium sized businesses would be contrary to law.

V. THE ILECS MAKE NO CREDIBLE SHOWING THAT COMPETITION EXISTS IN THE SMALL-TO-MEDIUM SIZED BUSINESS MARKET

The ILECs claim sufficient competition exists in the mass market and the large business market to allow a finding of non-dominance. As the comments show, this is untrue. The ILECs' argument concerning market power completely overlooks the small to medium sized business markets served by the Joint Commenters. The FCC has referred to this market segment in the Notice as Small Home Offices ("SHOs") and Small and Medium Sized Enterprises ("SMEs").

Any market power analysis must consider the small to medium sized business market segment as a separate, relevant market. This market could be defined as companies serving between 3 and 25 access lines. Many companies, including the Joint Commenters, have built their entire business plans around serving this market niche, and for good reason. As Ad Hoc's comments show, this market is badly underserved.¹⁹ Accordingly, any market power analysis must recognize the small to medium sized businesses as a separate product market.

Numerous commenters pointed to the absence of competition in the small-to-medium sized business market.²⁰ The ILECs do not take issue with this conclusion. Instead,

¹⁷ Hausman, Sidak, Singer Article at 305.

¹⁸ See the Regulatory Flexibility Act of 1980, 5 U.S.C. §601, §605(b) (a regulatory flexibility analysis be prepared for notice and comment proceedings unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities").

¹⁹ See Ad Hoc comments at 7-8.

²⁰ See Comments of Cbeyond and NuVox at 3-4; Ad Hoc comments at 14; AT&T comments at 40-41.

they focus on the mass market and the larger business market, claiming those markets are subject to both inter- and intramodal competition, while hoping that the Commission will not notice that any discussion of competition in the small-to-medium sized business market has been omitted.

In our initial comments, the Joint Commenters provided evidence that small and medium sized businesses have access to few competitive choices.²¹ Ad Hoc Telecom Users survey of business telecommunications users reinforces this point. Of 30,000 locations polled, less than 10 percent had access to competitive alternatives of any kind.²² In contrast to this empirical proof submitted by Ad Hoc, the ILECs list two websites to support its claim that some cable providers are seeking to rollout service to businesses.²³ But this service could not be available in many locations due to the fact that cable companies primarily serve residential areas. As noted above, the ILECs' own experts echo this conclusion, stating that "cable has little presence in the business sector."²⁴

The small to medium sized business market served by the Joint Commenters is an important one. The record indicates that *no* meaningful intermodal competition exists in this market. Although limited amount of *intramodal* competition may exist in these markets (many commenters pointed out that the ILECs' possess a commanding 93 percent share of the wireline broadband market),²⁵ the Commission's pending initiatives such as this proceeding, its Wireline Broadband proceeding, and the Triennial Review have proposed a weakening of regulatory safeguards, and therefore, could jeopardize this competition. The record demonstrates that

²¹ Comments of Cbeyond and NuVox at 3-4.

²² Ad Hoc comments at 15.

²³ SBC comments at 31 n. 98. When visited, these sites show the service would be provided by [Excite@home](#), which recently went bankrupt, leaving many customers in the lurch, while the Roadrunner business service, according to the web link, appeared to be available only in central and northern New York State.

²⁴ Hausman, Sidak, Singer Article at 305.

²⁵ Earthlink comments at 33.

ILECs remain dominant in this market and should continue to be subject to dominant carrier regulation. If it truly seeks competition, the Commission should stringently enforce its existing rules, including retaining its existing list of UNEs. By committing to enforcing, and not dismantling, its current rules, the Commission will enable the only true competitive alternative in this market -- wireline competition -- to grow, and ultimately to provide a true challenge to ILEC dominance.

VI. THE RECORD SHOWS THAT DEREGULATION OF THE ILECS WILL INCREASE PRICES, NOT DECREASE THEM

As demonstrated above, broadband deployment is a problem of lack of demand, not lack of supply. Many have criticized the “build it and they will come” business plan whereby companies build large networks in anticipation of future demand from customers. For the Commission to drastically overhaul its regulatory framework to aid the ILECs in building networks for which no demand currently exists is merely to repeat the worst mistakes of the “build it and they will come” strategy. Indeed, if broadband networks are built, customers will arrive in droves, but only if the service is offered at a competitive price. And, whether a competitive price exists depends solely on whether the Commission maintains and stringently enforces rules that allow competition on a level playing field.

As this record shows, there is recent historical precedent to show what will happen if the Commission grants regulatory concessions in return for vague promises of ILEC deployment of broadband: the ILECs will raise prices.²⁶ The comments of the Ad Hoc Group of Telecommunications Users show that ILECs *increased* special access prices when given pricing flexibility.²⁷ Given the ILECs’ track record, it is easy to predict what will occur if the ILECs

²⁶ Comments of NuVox and Cbeyond at 24-25.

²⁷ Ad Hoc comments at 13.

succeed in convincing the Commission to declare them nondominant: prices will rise, and competition will suffer.

VII. THE ILECS MARKET POWER ANALYSIS FAILS TO DISTINGUISH BETWEEN WHOLESALE AND RETAIL MARKETS

The ILECs' claims that they are "small minority players" in the broadband market are ludicrous.²⁸ As exhaustively proven in the comments of AT&T and others, ILECs possess market power in the retail and larger business mass markets.²⁹ In addition, the ILECs fail to distinguish between the wholesale and retail markets. As many commenters noted, the ILECs unquestionably remain dominant in the wholesale markets as they maintain bottleneck control over facilities that competitive carriers such as the Joint Commenters must use to provide broadband service.³⁰ The Commission must recognize this distinction in any analysis of ILEC market dominance.

VIII. DOMINANT CARRIER TARIFF FILING REQUIREMENTS REMAIN VITAL IN DETECTING AND DETERRING DISCRIMINATION, WHILE THE ILECS HAVE FAILED TO SUBMIT ANY EVIDENCE THAT THE COST OF REGULATION IS SIGNIFICANT OR THAT IT IS STALLING BROADBAND DEPLOYMENT

Verizon claims that the Commission "disproportionately" regulates dominant carriers.³¹ In fact, the law requires that Verizon is regulated as a dominant carrier because Verizon possesses market power in its markets. To maintain, as Verizon does, that this regulation is "disproportionate" is a joke. The Commission now imposes stringent regulation on CLEC access and reciprocal compensation rates, and is considering requiring heretofore unregulated Internet providers to pay into the Universal Service Fund. If anything, the trend

²⁸ See, e.g., AT&T comments at 19-36.

²⁹ *Id.*

³⁰ DirectTV Broadband comments at 5-6; Earthlink comments at 22-25.

³¹ Verizon comments at 39.

appears to be for the Commission to reduce regulation on ILECs, and to impose it on everyone else.

The reality is that the cost of dominant carrier regulation is *de minimis* in comparison with the costs faced by competitive carriers in dealing with the ILECs, such as negotiating and arbitrating interconnection disputes and obtaining and paying for UNEs and collocation, and no commenter has submitted any credible evidence to the contrary. Competitive carriers must deal with entrenched monopoly carriers, as well as with local municipalities in obtaining rights-of-way. Like the ILECs, many CLECs also file tariffs.³² Indeed, the filing of tariffs reduces negotiation costs in the carrier-to-carrier context, thus relieving carriers of negotiating individual interconnection agreements with every carrier that seeks to use its service. Given the option of filing tariffs or detariffing, most CLECs have found that continuing to file tariffs is the most cost-efficient way to proceed. Carriers that have nothing to hide also have no objection to publicly filing their rates in tariffs. The fact remains that dominant carrier tariff filing requirements remain vital in detecting and deterring unlawful discrimination, while at the same time, imposing only modest compliance costs.

Even ILECs have recognized in comments in this proceeding that tariffs play a vital role in preventing and detecting discrimination. For instance, SBC claims small business customers need not fear the result of this proceeding because DS-1 and DS-3 service “will continue to be subject to significant and growing competition, *as well as dominant carrier regulation that will ensure the continued availability of reasonably priced service offerings.*”³³

³² The ILECs’ citation of cases showing carriers invoking the filed rate doctrine to the detriment of customers in the interexchange context are inapposite. *See, e.g.*, SBC comments at 78. In the carrier-to-carrier context, sophisticated commercial parties make appropriate use of tariffs to detect and prevent discrimination, exactly as the Communications Act intended. The carrier-to-carrier situation bears no comparison to the carrier to end-user situation where carriers have invoked the filed rate doctrine to the detriment of end-user customers.

³³ SBC comments at 31 (emphasis supplied).

Thus, SBC uses the fact that tariffs would be maintained as a safeguard that makes a nondominance finding possible, apparently oblivious to the fact that the end-result of the relief it seeks would remove the very safeguard it believes would deter its unlawful conduct.

That tariffs play a vital role in making competition possible is especially true for many carriers, including some of the Joint Commenters, which must obtain inputs from the ILECs at tariffed rates in order to provide their service. Yet, the Notice proposes to remove these crucial safeguards. Requiring ILECs to cost-justify and file their rates in tariffs remains vital to competitors such as the Joint Commenters, who use the tariffed services as inputs in their own offerings. The FCC must continue to impose dominant carrier regulation on the ILECs to ensure that competition can continue to grow.

IX. THE TELECOM ACT REQUIRES A *WIRELINE* COMPETITIVE THREAT, AND ONLY A *WIRELINE* COMPETITIVE THREAT CAN SPUR ILEC DEPLOYMENT OF BROADBAND

Verizon makes the bare assertion that “the record shows current regulation stifles rather than stimulates investment in advanced services.”³⁴ In fact, the record shows just the opposite. As our prior comments and those of several others show, there is a direct correlation between ILEC capital expenditures and the competitive threat posed by CLECs. As many commenters also pointed out, CLECs were the first to deploy innovative services, such as DSL. ILECs did not deploy their own DSL facilities until faced with this competitive threat.

CLECs have always been a step ahead of the ILECs when it comes to innovation. This innovation is still occurring. CLECs created the DSL market after the ILECs, seeking to protect their profits from other services, refused to deploy DSL. Recently, the consulting organization the Yankee Group noted that CLECs were taking the lead in introducing integrated

³⁴ Verizon comments at 34.

services to small businesses, such as providing both voice and data over DS-1 lines.³⁵ This kind of innovation is exactly what the drafters of the Act intended. Nonetheless, as the record of this proceeding shows, the levels of competition provided by CLECs remain well short of that necessary to provide any challenge to ILEC dominance. To declare ILECs nondominant in the provision of broadband when no meaningful competition exists as a check on this market power threatens to stop this innovation in its tracks. In order to preserve competition, and thereby, innovation, the Commission must not give into ILEC pleas to gut the regulations that make innovation possible.

X. CONCLUSION

For the reasons discussed above, NuVox and KMC urge the Commission to enforce rigorously its existing rules to enable competitive carriers to build on the start they have made and allow broadband competition to flourish.

Respectfully submitted,

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³⁵ Mike Lauricella, “Integrated Services: Driving CLEC Revenue, Attracting RBOC Attention,” Yankee Group Research Notes, March 12, 2002 at 13.

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